

LOWER BASIN DROUGHT CONTINGENCY PLAN AGREEMENT

This LOWER BASIN DROUGHT CONTINGENCY PLAN AGREEMENT (“LB DCP Agreement”) is made and entered into this ____ day of _____, 2018, by and between the UNITED STATES OF AMERICA (“United States”), represented by the Secretary of the Interior (“Secretary”) and acting through the officer executing this LB DCP Agreement, [certain entities in ARIZONA], [certain entities in CALIFORNIA], the COLORADO RIVER COMMISSION OF NEVADA, an agency of the State of Nevada (“CRCN”), and the SOUTHERN NEVADA WATER AUTHORITY a political subdivision of the State of Nevada (“SNWA”), each of which is at times referred to individually as “Party” or collectively as “Parties”, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), designated the Reclamation Act, and acts amendatory thereof or supplementary thereto; the Act of January 12, 1927 (44 Stat. 957, 43 U.S.C §397a); the Act of December 21, 1928 (45 Stat.1057), designated the Boulder Canyon Project Act; and the Act of September 30, 1968 (82 Stat. 885), designated the Colorado River Basin Project Act, all of which acts are part of the body of law commonly known and referred to as Federal Reclamation law.

RECITALS

A. WHEREAS, as a result of actual operating experience subsequent to the adoption of the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (“2007 Interim Guidelines”), as well as emerging scientific information regarding the increasing variability and anticipated decline in Colorado River flow volumes, the Parties recognize and acknowledge that entities that rely on the Colorado River as a water source face increased individual and collective risk of temporary or

prolonged interruptions in water supplies, with associated adverse impacts on the society, environment and economy of the southwestern United States.

B. WHEREAS, the Parties recognize that for decades dating back to 1970, reliance on pragmatic and cooperative Colorado River operational strategies has proven more durable, adaptable, and effective than approaches that would rely exclusively on a determination of precise legal rights and obligations. This approach has also served to avoid destabilizing inter- or multi-state litigation, thereby preserving operational flexibility to respond to changing conditions and societal concerns.

C. WHEREAS, the parties recognize the need to develop and test, on an interim basis, additional operational tools through December 31, 2025 (through preparation of the 2026 Annual Operating Plan for Colorado River reservoirs developed by the Secretary to implement the Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act of September 30, 1968), to address and reduce the likelihood of the continued decline of the elevation of Lake Mead.

D. WHEREAS, the Parties, in consultation with the States of Colorado, New Mexico, Utah, and Wyoming, and stakeholders throughout the Colorado River Basin, have developed the Lower Basin Drought Contingency Operations (“LBOPs”) attached hereto as Exhibit “1” and incorporated herein by this reference, which, among other things, provides for the storage of water in Lake Mead under varying conditions, and incentivizes the creation and storage in Lake Mead of Intentionally Created Surplus (“ICS”) under the 2007 Interim Guidelines.

E. AND WHEREAS, for their individual and mutual benefit, the Parties make the commitments set forth herein recognizing the individual and collective harm that could occur

from prolonged interruptions in Lower Basin water supplies from the Colorado River.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises set forth herein, and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **Definitions.** Terms defined in the LBOps or 2007 Interim Guidelines have the same meaning when used in this LB DCP Agreement.

2. **Term.** This LB DCP Agreement shall commence on _____ and terminate on the later of (i) December 31, 2026; or (ii) the date on which all ICS Accounts and DCP ICS Accounts are reduced to zero (in either case, the “Term”).

3. **Agreements of the Secretary.** Subject to applicable law, including the availability of appropriations:

a. ***Implementation of LBOps.*** Beginning on the Effective Date of the LBOps, the Secretary shall perform those Secretarial actions required in the attached LBOps.

b. ***Development of Colorado River System Water.*** The Secretary will take affirmative actions to implement Lower Basin programs designed to create or conserve 100,000 acre-feet per annum or more of Colorado River System water to contribute to conservation of water supplies in Lake Mead and other Colorado River reservoirs in the Lower Basin. Prior to implementing affirmative actions pursuant to this Section, the Secretary will meet and confer with the other Parties. The other Parties hereto shall not request delivery of, and the Secretary shall not deliver to any Party or Contractor, the volumes of Colorado River System water conserved through programs implemented by

the Secretary under this Section. For informational purposes, there are a number of Lower Basin system efficiency activities/projects that the Secretary may undertake in fulfillment of this commitment.

c. ***Additional Appropriations.*** The Secretary will explore mechanisms to arrange for additional appropriations or other funding mechanisms to assist the Parties in taking additional Lower Basin drought response actions in a manner consistent with the goals of this LB DCP Agreement.

4. Agreements of the non-federal Parties.

a. ***Intra-State DCP Agreements.*** Prior to or concurrent with the execution of this LB DCP Agreement, the non-federal Parties shall enter into and implement Intra-State DCP Agreements as necessary to carry out the obligations of the non-federal Parties in the LBOps and enable the Secretary to perform the Secretarial actions required in the LBOps.

b. ***ICS.*** The non-federal Parties agree that no Party or Contractor may claim as surplus under Article II.B.6 of the Consolidated Decree any DCP ICS created under the LBOps. Notwithstanding any contrary provisions in existing Lower Basin ICS agreements dated December 13, 2007; November 20, 2012; and September 21, 2017, ICS shall be available according to the terms and conditions of the LBOps.

c. ***Implementation of LBOps.*** Beginning on the Effective Date of the LBOps, the non-federal Parties shall perform those actions necessary to fulfill the requirements of the LBOps, including, without limitation, the obligation to make DCP Contributions as and when required.

d. ***Future ICS Exhibits.*** Each of the Parties to the 2007 Lower Basin Intentionally Created Surplus Agreement (“ICS Agreement”) agrees to consider and approve or reject any newly proposed or amended exhibit to the ICS Agreement within 120 days of the proposal. If a party rejects the exhibit, that party shall provide a meaningful explanation of the basis for its rejection.

e. ***Sharing Agreement.*** Concurrently with the execution of this LBDCP Agreement, certain Parties are executing the DCP Contributions and ICS Accumulation Limits Sharing Agreement, which provides:

- i. Pursuant to Section IV(C) of the LBOps, SNWA and CRCN shall make up to 50,000 acre-feet of ICS accumulation space available for use by Contractors in Arizona under the conditions described therein; and
- ii. Pursuant to Section IV(C) of the LBOps, Metropolitan shall make up to 50,000 acre-feet of ICS accumulation space available for use by Contractors in Arizona under the conditions described therein.

5. Additional Provisions.

- a. ***No Waiver.*** The failure of any Party to enforce a provision of this LB DCP Agreement shall not be deemed to constitute a waiver of that provision.
- b. ***No Precedent.*** This LB DCP Agreement does not establish or act as precedent for any future agreement or undertaking.

c. ***Reservation of Rights.*** Except as expressly provided herein or in the LBOps, nothing in this LB DCP Agreement or the LBOps shall be deemed to diminish or waive the rights of any Party under Federal Reclamation Law, the Law of the River (as defined in the Agreement Concerning Colorado River Drought Contingency Management and Operations (“Companion Agreement”)), or under any other state, federal, or local law.

d. ***Actual Operating Experience.*** Adoption of the additional provisions related to ICS in the LBOps does not preclude exploration of additional provisions for operational flexibility during the Interim Period in light of actual operating experience.

e. ***Uncontrollable Forces.*** No Party shall be considered to be in default in the performance of any of its obligations under this LB DCP Agreement when a failure of performance shall be due to any cause beyond the control of the Party affected, including but not limited to, facilities failure, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority which by exercise of due diligence and foresight such Party could not have reasonably expected to avoid. A Party rendered unable to fulfill any of its obligations under this LB DCP Agreement by reason of an Uncontrollable Force shall give prompt written notice of such act to the other Parties and shall exercise due diligence to remove such inability with all reasonable dispatch.

f. ***Representations and Warranties.*** Each Party warrants and represents to each of the other Parties, as a material inducement to enter into this LB DCP Agreement and not as a mere recital, the following:

1. The Party has all legal power and authority to enter into this LB DCP Agreement and to perform its obligations hereunder on the terms set forth in this LB DCP Agreement, and the execution and delivery hereof by each Party and the performance by each Party of its obligations hereunder shall not violate or constitute an event of default under the terms or provisions of any agreement, document, or instrument to which each of the Parties is a Party or by which each Party is bound.

2. The individual executing this LB DCP Agreement on behalf of the Party has the full power and authority to bind the Party he or she represents to the terms of this LB DCP Agreement.

3. This LB DCP Agreement constitutes a valid and binding agreement of each Party, enforceable against each Party in accordance with its terms.

4. The Party is authorized by, and has undertaken all prerequisite actions required by, applicable Federal and State laws and regulations to perform the obligations and exercise the rights contemplated herein.

g. **Governing Law.** This LB DCP Agreement shall be interpreted, governed by, and construed under applicable Federal law. To the extent permissible under the Federal Rules of Civil Procedure and other applicable Federal authority, venue for adjudication of any disputes under this LB DCP Agreement shall be in an appropriate Federal court.

h. **Successors and Assigns.** The provisions of this LB DCP Agreement shall apply to and bind the successors and assigns of the Parties, but no assignment or

transfer of this LB DCP Agreement or any right or interest herein shall be valid until consented to in writing by all Parties, which consent shall not be unreasonably withheld.

i. ***Amendments and Modifications.*** This LB DCP Agreement may be amended or modified, but only by the written agreement of the Parties after consultation as set forth in Paragraph I of the Companion Agreement..

j. ***Drafting Considerations.*** Each Party and its counsel have participated fully in the drafting, review, and revision of this LB DCP Agreement, each of whom is sophisticated in the matters to which this LB DCP Agreement pertains, and no one Party shall be considered to have drafted this LB DCP Agreement.

k. ***Notices.*** All notices and requests required or allowed under the terms of this LB DCP Agreement shall be in writing and shall be mailed first class postage paid to the following entities at the following addresses:

RECLAMATION:

Regional Director
Lower Colorado Region
Attention: LC-1000
500 Fir Street
Boulder City, NV 89005

[INSERT OTHERS]

A Party may change its address by giving the other Parties notice of the change in writing.

l. ***No Third Party Beneficiaries.*** This LB DCP Agreement and any

agreements made or actions taken pursuant hereto are made solely for the benefit of the Parties. No Party to this LB DCP Agreement intends for this LB DCP Agreement to confer any benefit upon any person or entity not a signatory upon a theory of third-party beneficiary or otherwise.

m. ***Resolution of Claims or Controversies.*** The Parties recognize that judicial or administrative proceedings are not preferred alternatives to the resolution of claims or controversies concerning the Law of the River. In furtherance of this LB DCP Agreement, the Parties desire to avoid judicial or administrative proceedings, and agree to pursue a consultative approach to the resolution of any claim or controversy. If any Party becomes concerned that there may be a claim or controversy under this LB DCP Agreement or, specific to the Secretary, Section 601 of the Colorado River Basin Project Act of 1968 (43 U.S.C. § 1551), and all applicable rules and regulations promulgated thereunder, such party shall notify all other Parties in writing, and the non-federal Parties shall in good faith meet to resolve such claim or controversy by mutual agreement prior to initiating any judicial or administrative proceeding. No non-federal Party shall initiate any judicial or administrative proceeding arising out of this LB DCP Agreement against any other Party, and no claim hereunder shall be ripe, until such consultation has been completed. Notwithstanding any other provision of this LB DCP Agreement, this Section 5.m shall survive for a period of five (5) years following the expiration of this LB DCP Agreement.

n. ***Joint Defense Against Third-Party Claims.*** The Parties have certain common, closely parallel, or identical interests in supporting, preserving, and defending

o. **Counterparts.** This LB DCP Agreement may be executed in counterparts, each of which shall be an original and all of which, together, shall constitute only one LB DCP Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this LB DCP Agreement on the

LB DCP Agreement - Final Review Draft - 10.5.18

